646

(3)

No. 07-91

FILED
SEP 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

TYSON A. DITCH, PETITIONER

v.

JAMES L. GRACE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

STEFFEN N. JOHNSON
TYSON R. SMITH*
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

**Counsel of Record*

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF IN SUPPORT OF CERTIORARI 1

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES:

Coleman v. *Alabama*,
399 U.S. 1 (1970) 7

Gilbert v. *California*,
388 U.S. 263 (1967) 7

Hunter v. *Moore*,
304 F.3d 1066 (11th Cir. 2002) 3

Moore v. *Illinois*,
434 U.S. 220 (1977) 7

Plumlee v. *Del Papa*,
465 F.3d 910 (9th Cir. 2007) 3

State of Oregon v. *Miller*,
2007 WL 2380282 (Or.App. Aug. 22, 2007) 5, 6

United States v. *Cronic*,
466 U.S. 648 (1984) 5

United States v. *Gonzales-Lopez*,
126 S. Ct. 2557 (2006) 4

United States v. *Salemo*,
61 F.3d 214 (3d Cir. 1995) 2, 8

Van v. *Jones*,
475 F.3d 292 (3d Cir. 2007) 3

White v. *Maryland*,
373 U.S. 59 (1963) 7

STATUTES:

234 Pa. Code 542(C) (1998) 7

MISCELLANEOUS:

Right to Counsel: Denial of Counsel at Critical Stage Didn't Give Rise to Presumption of Prejudice, 80 CRIM. L. REP. 620 (2007) 4

Right to Counsel: Reversal Not Automatic for Denial of Counsel at Probable Cause Hearing, 79 CRIM. L. REP. 702 (2006) 4

Supreme Court—Leading Cases, 120 HARV. L. REV. 203, 207 (2006) 4

REPLY BRIEF IN SUPPORT OF CERTIORARI

Nothing in the brief in opposition casts any doubt on our showing (Pet. 8-19) that the lower courts are divided over the appropriate remedy for a complete denial of a criminal defendant's right to counsel at a critical stage of the prosecution. As we demonstrated, the Third Circuit—like the Fourth and Tenth Circuits, and the Connecticut Supreme Court—holds that the denial of counsel at a critical stage is subject to harmless error analysis, whereas the Sixth, Ninth, and Eleventh Circuits hold that such denials of counsel automatically require reversal. The conflict on this recurring and important issue is thus both wide and entrenched, and only this Court's review can resolve it.

Respondent's sole response is that "[t]here is no split of authority among Third Circuit Court of Appeals decisions on the legal test used to assess the denial of counsel at a state preliminary hearing." Opp. 1. But this is irrelevant: the conflict we are relying upon is not *among* Third Circuit decisions (which would justify rehearing en banc), but *between* the Third Circuit's approach—which two other circuits and one state supreme court follow—*and that of at least three other Circuits* (which makes the case appropriate for this Court's resolution). Respondent concedes the existence of the conflict, but asserts that "an inflexible rule of reversal is not warranted" and that this Court should "[a]llow[] district and circuit courts a flexible approach in deciding whether a Sixth Amendment violation is a constitutional trial error subject to the harmless error analysis or a structural error subject to an automatic reversal." Opp. 4. The question whether denying a criminal defendant the right to counsel at a critical stage is subject to harmless error analysis, however, is both recurring and too important to allow divergence among the lower courts.

Respondent's remaining arguments boil down to points on the merits that, even if correct (and they are not), would not undermine the importance of granting review.

Respondent does not deny that more than 35 States and the federal courts have preliminary hearings similar to those in Pennsylvania—and thus that the question presented has ramifications for thousands of other cases annually. See Pet. 20. Nor does respondent dispute the general significance of the constitutional issues involved. See Pet. 22-24. As shown in the petition, the "harmless error" test applied by the court below (and others) effectively eviscerates the fundamental and historical protections of the Sixth Amendment right to counsel, replacing core constitutional safeguards with post hoc rationalizations designed to support a tainted verdict. Thus, even apart from the conflicts among the lower courts, the need for clear guidance on this recurring issue of national significance warrants this Court's plenary review.

We address respondent's arguments in greater detail below.

1. Citing the absence of any "split of authority among Third Circuit decisions" on the question presented, respondent first maintains that petitioner merely "disagrees with the application of settled law to his claim." Opp. 1. Even assuming that the decision below "settled" the law in the Third Circuit, however, respondent ignores our showing (Pet. 9-14) that conflicting legal standards among the several circuits would lead to different results in comparable cases.[1]

---

[1] Petitioner did seek rehearing en banc on this issue, noting, for instance, that the Third Circuit in *United States* v. *Salemo*, 61 F.3d 214 (1995), had "decline[d] to engage in a harmless error analysis" where the defendant was not represented by counsel at a sentencing hearing (also a "critical stage") because the right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *Id.* at 221-222; but see *id.* at 223-224 (Alito, J. concurring) (declining to address "whether the unconstitutional deprivation of counsel at sentencing can be harmless" where resolution of the question was not necessary to

It cannot seriously be disputed that this case would have come out the other way if the court below had applied the Sixth, Ninth, or Eleventh Circuit's rule. In those courts, the "complete absence of counsel at a critical stage of a criminal proceeding is a per se Sixth Amendment violation warranting reversal of conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error." *Van* v. *Jones*, 475 F.3d 292, 311-312 (6th Cir. 2007); see also *Hunter* v. *Moore*, 304 F.3d 1066, 1069-1070 (11th Cir. 2002) (affirming the district court's reversal of a state court's denial of habeas relief on harmless error grounds, holding that "the denial of counsel at a critical stage . . . warrants reversal without a specific showing of prejudice"); *Plumlee* v. *Del Papa*, 465 F.3d 910, 923 (9th Cir. 2007) (concluding that actual denials of counsel mandate a legal presumption of prejudice without any "further showing that the trial judge's erroneous [actions] resulted in prejudice"); Pet. 11-13. Thus, the complete denial of counsel at a preliminary hearing would mandate automatic reversal in those circuits, while the Third, Fourth, and Tenth Circuits, and the Connecticut Supreme Court would apply a harmless error test to determine whether to reverse such a conviction. Pet. 10-11.

Respondent does not address the conflict among these courts and, with one exception, does not even *cite* the cases that conflict with the decision below. The exception is *Van* v. *Jones*, but respondent cites that case only for the proposition that this Court should "allow[] district and circuit courts [to adopt] a flexible approach in deciding whether a Sixth Amendment violation is a constitutional trial error subject to the harmless error analysis or a structural error subject to an automatic reversal." Opp. 4. Respondent thus acknowledges that these courts apply different legal tests to Sixth Amendment violations to arrive at different

---

decide the case and in light of the fact that different lines of Supreme Court authority point in different directions on the issue).

outcomes—and that the scope of the Sixth Amendment right to counsel varies substantially from circuit to circuit. The basis for review under Supreme Court Rule 10, however, is the need for uniformity among lower court decisions, and variability (or elasticity) should not be the hallmark of judicial decisions on important federal questions such as the scope of the constitutional right to be represented by counsel during a criminal proceeding.

2. Respondent also neglects to address the conflict between the decision below and decisions of this Court. See Pet. 14-17. For example, he does not address the tension between the holding below and *United States* v. *Gonzales-Lopez*, 126 S. Ct. 2557 (2006), which would require automatic reversal for the denial of the defendant's counsel of choice at the same preliminary hearing. *Gonzales-Lopez* held that once a defendant has been denied his counsel of choice, the Sixth Amendment violation is complete and automatic reversal is warranted. *Id.* at 2563. Thus, if the judge here, rather than forcing Ditch to proceed *without* an attorney, had forced Ditch to proceed with a *different* attorney, *Gonzales-Lopez* would require automatic reversal of his conviction. As several commentators have recognized, this anomaly has created confusion among the lower courts and provides yet a further reason to grant review. See *Right to Counsel: Denial of Counsel at Critical Stage Didn't Give Rise to Presumption of Prejudice*, 80 CRIM. L. REP. 620 (2007) (discussing the conflicting logic of the Third Circuit's rule and *Gonzales-Lopez*); *Right to Counsel: Reversal Not Automatic for Denial of Counsel at Probable Cause Hearing*, 79 CRIM. L. REP. 702, 703 (2006) (reading *Gonzales-Lopez* to suggest that this Court "might take issue with the Fourth Circuit's ruling [in *Owen*]," on which the decision below relied); cf. *Supreme Court—Leading Cases*, 120 HARV. L. REV. 203, 207 (2006) (discussing the "obvious incongruity" between *Gonzales-Lopez* and the Court's ineffective assistance of counsel decisions).

3. Rather than address the conflict among the circuits or the conflict between the decision below and *Gonzalez-Lopez*, respondent simply asserts without explanation that the decision below "does not create a new subset of Sixth Amendment violations involving complete denial of counsel at a critical stage that are not subject to the *United States* v. *Cronic*, 466 U.S. 648 (1984), presumption of prejudice." Opp. 6. But respondent does not explain how the decision below can be squared with *Cronic*. The Court there explained that a "complete denial of counsel" at a "critical stage of [the defendant's] trial" was one of "three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in particular case is unjustified.'" 466 U.S. at 659. "The Court has uniformly found constitutional error without any showing of prejudice," the Court continued, "when counsel was * * * prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25 (collecting cases).

The court below expressly acknowledged that the preliminary hearing in Pennsylvania is a "critical stage" of the prosecution and that, as a result, the protections of the Sixth Amendment apply. Pet. App. 53a-54a. But rather than apply *Cronic*'s requirement of automatic reversal "without any showing of prejudice" (466 U.S. at 659 n.25), the court below concluded that the denial of counsel at the outset of a criminal proceeding—where an identification is made, and testimony and evidence subsequently used at trial are introduced—may or may not require reversal, depending upon whether, all things considered, the deprivation was "harmless." Pet. App. 55a. Such an approach is flatly inconsistent with this Court's analysis in *Cronic*.

Even since the filing of the petition, other courts have recognized the need to reconcile this Court's jurisprudence on the denial of "assistance of counsel" under *Cronic* and the denial of "counsel of choice" under *Gonzales-Lopez*. In

State of Oregon v. *Miller*, 2007 WL 2380282 (Or. App. Aug. 22, 2007), the court harmonized the two lines of cases into a single test. Citing both *Cronic* and *Gonzales-Lopez*, the court noted that the inquiry into whether a harmless error analysis was appropriate involved two questions: (1) was the proceeding for which counsel was denied a "critical stage" at which the defendant was entitled to counsel; and (2) if so, was there a *complete* denial of counsel during that critical stage. *Id.* at *6. Once the court concluded that the denial of counsel was not complete and, thus, that the presumption of prejudice from *Cronic* and automatic reversal under *Gonzales-Lopez* did not apply, the court analyzed the issue using a harmless error analysis. *Id.* at *7-8. But the court's decision recognizes that where, as here, the denial of counsel at a critical stage is complete, *Cronic* and *Gonzalez-Lopez* together require automatic reversal. This Court's guidance is needed to confirm that this is so.

4. Respondent attempts to defend the decision below on the merits by asserting that the court properly applied the "harmless error" test in affirming the conviction. Of course, this analysis is irrelevant if the harmless error standard should not have applied, and the important point is that the courts are divided on that question. But in any event, respondent does not deny that a preliminary hearing is a "critical stage" of the prosecution, or that there are good reasons for treating it as such. Indeed, respondent does not even mention the preliminary hearing that is the focus of this appeal, much less address the adverse consequences of the constitutional violation. Opp. 2-4.

As we explained in the petition, the prosecution at the preliminary hearing in this case questioned an eyewitness who later testified at trial, as well as a police officer that was subsequently unavailable at trial. The prosecution also introduced other evidence (*e.g.*, ballistics test results and a phone trace) at the hearing that was used against Ditch at his trial. But despite Ditch's strenuous objec-

tions, at no point during the hearing did counsel represent him. Without the benefit of counsel, Ditch was unaware of, and thus failed to exercise, his rights under Pennsylvania law to cross-examine witnesses and inspect physical evidence, call witnesses on his behalf, offer evidence on his behalf, testify, or make written notes of the proceedings. 234 Pa. Code 542(C) (1998). The preliminary hearing, then, was indeed "critical," and the presumption of prejudice requiring automatic reversal should have been applied.

5. Respondent further argues that the court below correctly applied *Gilbert* v. *California*, 388 U.S. 263 (1967), and *Moore* v. *Illinois*, 434 U.S. 220 (1977), with respect to the uncounseled pretrial identification. Opp. 4-5. But, like the court below, respondent ignores the other aspects of the Sixth Amendment violation, including Ditch's inability to cross-examine the State Trooper who was unavailable at the later trial, the impact of the other evidence introduced at the preliminary hearing (ballistics, phone trace), and the lost opportunity to develop information that could be used to prepare an effective defense—all of which were compounded by the deficient performance of counsel at trial. See Pet. App. 63a ("[W]e conclude that Ditch's trial counsel's performance fell below an objective standard of reasonableness.").

6. Respondent also contends that the decision below is but a correct application of *Coleman* v. *Alabama*, 399 U.S. 1 (1970). Opp. 5-6. But while the Court there remanded a case involving the denial of counsel at a preliminary hearing for a determination whether the denial was harmless, the trial court in that case had scrupulously prohibited the use at trial of any of the evidence or testimony gathered at the uncounseled hearing. *Id.* at 10-11. The same cannot be said of Ditch's trial, as the eyewitness identification, evidence, and other testimony from the preliminary hearing were all admitted and used against him at trial. Thus,

this case more closely resembles *White* v. *Maryland*, 373 U.S. 59 (1963), wherein the Court vacated the defendant's criminal conviction *without* a showing of prejudice because an admission of guilt at an uncounseled preliminary hearing was later used against the defendant at trial. This is especially evident after *Cronic* and *Gonzales-Lopez*, which make clear that automatic reversal is warranted where a party is subject to a complete denial of counsel at a critical stage of the prosecution. But even if respondent's reading of *Coleman* were correct, that would not change the fact that the lower courts remain divided over the circumstances in which denials of counsel at critical stages of the prosecution require automatic reversal. Only this Court can clear up that confusion. See also *Salemo*, 61 F.3d at 222-224 (Alito, J. concurring) (contrasting *Coleman* with *White* and other cases).

7. Finally, respondent simply ignores our demonstration that the question presented is important and recurring even apart from the fact that it conflicts with various other circuit court decisions and with this Court's decisions. Some 35 States and the federal courts conduct preliminary hearings like those below, and the hearings number in the tens of thousands annually. The decision below, moreover, renders the protections of the Sixth Amendment—which the framers deemed vitally important, and which remain a vital check on governmental abuse today (see Pet. 22-23)—largely illusory, while at the same time spawning unnecessary litigation over their application. A clear rule that denials of counsel at critical stages of the prosecution warrant automatic reversal will deter Sixth Amendment violations and ensure that criminal defendants receive the fair trials to which they are constitutionally entitled. Respondent's failure to address these points further confirms that review is warranted.

* * * * *

In summary, six federal circuits and at least one state supreme court are divided over the question whether the complete denial of counsel at a critical stage of a criminal prosecution warrants application of harmless error analysis or automatic reversal. Moreover, the question has implications for thousands of other cases annually, not only in Pennsylvania but in 35 other States and in the federal courts. The petition should be granted to resolve this confusion and to make clear that the Sixth Amendment guarantee of the right to counsel may not, based on after-the-fact harmless error analysis, be abrogated at any critical stage of a criminal prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEFFEN N. JOHNSON
TYSON R. SMITH*
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

**Counsel of Record*

Counsel for Petitioner

SEPTEMBER 2007